Intermec Technologies Corp. v. Palm, Inc.
Doc. 343

EXHIBIT A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION
Case No. C05-03649 JW

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CLRB HANSON INDUSTRIES, LLC d/b/a INDUSTRIAL PRINTING, and HOWARD STERN, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

GOOGLE, INC.,

Defendant.

---x

August 6, 2009
2:10 p.m.

Deposition of MATTHEW WEISS, taken by the Plaintiffs, held at the office of Wolf Popper, LLP, 845 Third Avenue, New York, New York, before Joseph Ravenell, a Court Reporter and Notary Public of the State of New York.

A P P E A R A N C E S :

WOLF POPPER, LLP
Attorneys for Plaintiffs
845 Third Avenue
New York, New York 10022
BY: LESTER L. LEVY, ESQ.
(212) 451-9606
llevy@wolfpopper.com

ABEND & SILBER, PLLC
Attorneys for The Witness
419 Park Avenue South
New York, New York 10016
BY: RICHARD H. ABEND, ESQ.
(212) 532-7575
rabend@abendsilber.com

M A T T H E W W E I S S, having first been duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY

MR. LEVY:

Q. Would you state your name and address.

A. Matthew Weiss, 419 Park Avenue South, New York, New York 10016.

MR. ABEND: Just by counsel, in the course of preparing for today's deposition, Mr. Weiss noticed upon review of the original objections that the name was incorrectly placed. It should have read "Weiss & Associates, P.C.," not "Matthew Weiss" individually.

Additionally, there is a second account that Weiss & Associates, P.C. had with Google that was omitted from the initial objections. And that should be placed there as well.

Q. If I understand, I'll direct this to Mr. Weiss or Matthew, you

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personally, Matthew Weiss, you were not an AdWords advertiser. Am I correct on that?

A. Correct.

Q. The entity that advertised on AdWords was your law firm?

A. Correct.

Q. Which is a P.C.?

A. Correct.

Q. Matthew, what is your home address?

A. 105 Heather Drive, Roslyn, New York.

Q. And your occupation?

A. I'm an attorney.

Q. Do you have a specialty?

A. I have a general practice. We do a lot of vehicle and traffic law.

Q. And you have a website NY Traffic Ticket.com?

A. Among others. But that is my primary website.

Q. And you have one Traffic Ticket Lawyer? Is that one?

A. I might. But I honestly own

the way, this account had been paused from time to time.

Q. The first account you mentioned, was there any pausing that took place in that account?

(Witness reviews documents.)

A. There may have been, but I don't think so. The reason I say there may have been is because there are a few dates where there is no activity. And it's possible that no activity is due to a pausing. But they are isolated, single dates. So my best testimony would be that most likely there were no pauses on this account, being the first one.

Q. Who signed up Weiss & Associates, P.C. to the AdWords?

A. I did.

Q. How did you go about doing it?

A. I went online and I registered and filled out a form.

Q. Did you understand when you registered, you had to click to accept various terms and conditions that were on the site?

A. Yes.

Q. Did you read those terms and conditions before you accepted it?

A. No.

Q. Do you recall anything about what was said on that site about a daily budget?

A. It was my understanding that I was to furnish a daily budget and that Google would charge me up to the amount of my daily budget.

Q. Anything else?

A. I would be billed monthly on my credit card for whatever clicks and activity I had.

Q. Did you understand that in those terms and conditions that you clicked to accept there was a provision that Google could actually charge you up to 120 percent of your daily budget on any given day?

A. No, I didn't know that when I signed up.

tickets, and some criminal vehicle and traffic law matters. So if you get a lead on a parking ticket, that wouldn't help me. So more leads like that wouldn't help me. A Maryland traffic ticket wouldn't help me, because I'm not licensed nor do I practice in Maryland. So I can't say the more leads the better.

More qualified leads? Yes. But there is a point where you are optimizing and then there is a diminishing return. So you don't want to overspend.

So the answer is generally the more leads the better is not how you want to run a sophisticated pay-per-click campaign.

Q. Have you calculated what your damages are?

A. No. I started to and then I got a headache. But this sheet here, which looks a little different, it at the very top says "REPORT" in all caps, it has the budget and it has the cost. And line by line, you could see all the overcharges.

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A. Yes.

MR. LEVY: Off the record.

(Discussion off the record.)

MR. LEVY: Let me mark this as Weiss Exhibit 1.

(Weiss Exhibit 1 marked for identification.)

Q. You have before you what has been marked as Weiss Exhibit 1. Have you seen this document before?

A. Yes, I saw this document -- I've seen it before.

Q. When was the first time you saw it?

A. This week.

Q. It was filed July 14?

A. Correct.

Q. You didn't read it before it was filed?

A. No. I had discussions with my attorneys about the objection. But I did not see the final product or any written product until this week. And that's where I noticed the name was wrong and the account number had been omitted.

Q. You decided not to opt out of this class.

A. Correct.

Q. Why did you make that decision?

A. It's expensive to litigate. And I didn't think my damages would be worth the time to pursue a separate litigation.

Q. Now, reading this, it looks like your major objection is that the notice was defective. Am I reading that correctly?

A. I don't think so. My primary objection -- well, I can tell you when I originally got e-mailed the paperwork, I looked at it and saw that the settlement was $20 million. And I felt that that was exceedingly low for a company that generates somewhere in the neighborhood of $10 billion or more every year. And given the thousands and thousands of advertisers, adding it up, it just didn't sit well that this total number was the gross settlement.

And in terms of the contents of

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violates Federal Rule 23(h) because it doesn't say the basis for the attorney's fees. Am I reading that correctly?

A. Correct.

Q. Is it your testimony that Rule 23(h) requires that the basis for the attorney's fees be listed?

A. I'd have to look at 23(h) to answer that. But I could tell you that when you read the notice, it doesn't provide a basis for the fees. It's just a flat $5 million.

Q. Right.

A. And it seems like there was a lot of work done, motions for summary judgment. And it seems like that you and the other plaintiff's counsels did a very good job in withstanding in part that. But, again, that number may be reasonable, may be not. But I couldn't tell from reading the notice whether it was a reasonable fee.

Q. Have you done any research or have any general knowledge of what

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percentage-wise is the benchmark fee in the Ninth Circuit?

A. No, I have not.

Q. Have you read any of the filings in this lawsuit, court filings?

A. The only filing I've read is the class notice.

Q. Did you look at the docket sheet entries to see what is on file?

A. No. The only thing I read was the class notice.

Q. Did you make any effort to obtain any of the court filings so that you would have a better handle of what happened in this case?

A. Me personally? No. But there are attorneys who are handling this on my behalf or on Weiss & Associates' behalf I should say. So what they did, I can't answer that. I assume they did their due diligence. But I don't know.

Q. You don't know. So have you read any of the motion papers, the summary judgment motion papers, the motions to attorney in California.

Q. You are located in New York City?

A. Yes.

Q. Mr. Sherwood is located in California. I noticed that, look as Weiss Exhibit 1 and Weiss Exhibit 2, this document in each instance was served by a Janet Wood in Florida. Can you tell me how that came about?

A. It's my understanding that Mr. Sherwood is working with at least two other attorneys that are based in Florida in a co-counsel type of arrangement. I'm not sure exactly what they call it. But they are working together on this case.

Q. But the other counsel is not disclosed in any court filings. Somehow they are working together with Mr. Sherwood, but they are undisclosed?

A. I don't know what has been disclosed or not disclosed. I just know that Mr. Sherwood is one of the attorneys who I have spoken to about this case and about the objections.

Q. Who are the attorneys that are working for Mr. Sherwood?

A. Paul Rothstein and Albert Bacharach.

Q. Have you spoken to them?

A. I spoke to both. They are both based in Florida. So I assume the service from this Florida address is as a result of their involvement.

Q. Did you retain them to represent Weiss & Associates?

A. Yes.

Q. At the same time you retained Mr. Sherwood?

A. Well, okay, let's see. Mr. Rothstein and I had a conversation, at least one if not more. And then he consulted with other, I guess, Mr. Bacharach I know and probably Mr. Sherwood. And they decided that there was a merit to an objection. And they called -- Mr. Bacharach and Mr. Rothstein called me and said "Yes, we think there is merit to objecting and

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Q. Have you had prior dealings with Mr. Rothstein?
A. Yes.
Q. In what way?
A. We have worked on cases together in the past.
Q. Have you objected to class action settlements together?
A. When you say "you," do you mean Weiss & Associates?
Q. All right.
A. As far as I know, I don't think Weiss & Associates has ever objected to a class.
Q. But you have?
A. Personally I have, yes.
Q. I mean as an attorney as well as personally.
A. Oh, yes. In fact, you and I had a case together involving the Nassau County Title Insurance.
Q. So you and Mr. Rothstein and Mr. Bacharach have worked together in objecting to class action settlements?

A. Correct.

Q. And how many have you objected to?

A. When you say "you," you mean Weiss & Associates?

Q. You, Weiss & Associates, and then you together with these other attorneys.

A. I think this is the only one which Weiss & Associates objected to. But I could be wrong. As far as I know, though, this is the only one that I can recall. In terms of being an attorney representing a client objecting, probably less than -- well, I'd say less than ten.

Q. For you. That would be Matthew Weiss?

A. That would be Matthew Weiss as an attorney for an objector or Weiss & Associates as an attorney for objector. Cumulatively it would be roughly ten, maybe less.

Q. How many together with Mr. Rothstein and Mr. Bacharach?

A. I don't know exactly how many.

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But more than two or three.

Q. Of the ten?

A. Yes. Again, ten is the outermost. I could think of Iomega was one. There was an American General Life Insurance case. There was the title insurance case. We discussed others that didn't pan out to be worthy of objecting. And I don't recall the names of those cases. And those are the ones that came to mind.

Q. You gave me three. Iomega, American General and title insurance?

A. And then this one.

Q. Google.

A. Those are the only ones I can think of as I sit here.

Q. And what happened to the objections?

A. I believe in Iomega and in the American General Insurance case -- oh, there is another one. Gourmet, Roberts Gourmet.

In Iomega and American General,

not the right entity.

Q. Do you know a Steve Miller?

A. I don't think so.

Q. He is an attorney from Colorado.

A. No.

Q. Do you have any understanding what would be a fair and reasonable fee in this case?

A. No. And that's why we objected. You mean legal fee?

Q. Yes.

A. So the answer is no. That's why we objected, in part.

Q. Do you have an understanding what Google's defenses are in this case?

A. Well, I know they successfully defended and stripped out part of the allegations, the causes of action. And I know remaining are California deceptive-practice type of laws, that's my understanding, and that they are quite favorable for the plaintiff. I don't know what their defenses are to the California statutory violations. But that's the scope of what I understand the terms of defenses for the remaining case is.

Q. Are you aware whether that California statute requires individual reliance, so that every class member has to read the alleged misrepresentation?

A. No.

Q. Do you know whether the class was certified in this case before there was a settlement?

A. I don't know. I may have read it in the settlement, notice of pendency of settlement, but I don't recall.

Q. If Google had disclosed in the AdWords agreement that's online when you sign up that they had the authority to charge more than a daily budget, up to 120 percent, what in your view would be the strength of plaintiff's case at that point?

A. I couldn't comment on the strength of plaintiff's case. I could tell you me personally, I felt that you are dealing with Google and you don't really have much leverage. So whatever they say is how it's going to be. So I guess that hopefully helps you.

MR. LEVY: Let me just take a break. I'm almost done.

(Pause in the proceedings.)

Q. Were you involved in the TransUnion privacy litigation?

A. I may have. But I don't remember.

Q. There was an objection to a settlement filed about a year ago, Northern District of Illinois. Does that ring a bell?

A. Vaguely.

Q. So --

A. That may have been one of the ones I couldn't recall when you asked me to describe those earlier.

Q. It's one of the ones you did with Mr. Bacharach or Mr. Rothstein?

A. Probably.

Q. Do you recall any others?

A. I recall one without Mr. Rothstein involving Verizon and the Yellow Pages.

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Q. What do you recall about that?

A. I could tell you a lot about that case. Verizon had a book, Yellow Page book, that had a beginning date and an end date. Could have been July to June, for example, but I don't know the exact months. And they continued to charge advertisers beyond the expiration date on the book, because their new book either wasn't ready or they wanted to delay its release. And the theory was that this contract was for a year and that you are not allowed to charge the consumers beyond the expiration date of the book.

The lower court in New York said that the contract allows them to do that. I appealed and lost. And that was the end of that case. And that was not done. I was the only attorney officially on that case.

Q. Were you an objector?

A. No. In that case I had clients who I represented. But I was within the class as well. But I was not an objector. I was representing other objectors.

Q. And you lost that objection?

A. Correct.

Q. Did you appeal that?

A. Yes. I said that earlier. I appealed and lost.

Q. And that was the end of it?

A. Pretty much.

Q. What is your fee arrangement with your attorneys in this case?

A. Weiss & Associates has no fee arrangement. Matthew Weiss is to get 25 percent of any legal fee that is given as a result of our objection and any enhancements.

Q. So if there is any legal fee given to this consortium of attorneys based on your objection, you personally get 25 percent?

A. Correct.

Q. I take it Mr. Bacharach gets 25 percent?

A. I don't know. I assume that's